No. 14906

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND PULP AND TIMBER CO., a corporation,

Appellant,

vs.

JOE A. O'REILLY,

Appellee.

JOE A. O'REILLY,

Cross-Appellant,

vs.

PUGET SOUND PULP AND TIMBER CO., a corporation,

Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

EVANS, MCLAREN, LANE, POWELL & BEEKS
VAUGHN E. EVANS
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JURISDICTION

The complaint alleges (Tr. 3), and the evidence shows, that the appellant and the appellee are citizens of different states and the amount in controversy is in excess of $3,000.00, exclusive of costs

and interest. The District Court so found (Tr. 35). Jurisdiction of the District Court is conferred in Section 1332 of Title 28 USC and jurisdiction of this court to hear this appeal is conferred in Section 1291 of Title 28 USC.

STATEMENT OF THE CASE

This is an action by Joe A. O'Reilly, appellee, to recover additional commissions claimed to be due him under an agency agreement with a predecessor corporation of the appellant, Puget Sound Pulp & Timber Co., which agreement was assumed by appellant. The complaint alleges an agreement to pay commissions at the rate of three per cent of net sales but that only one and one-half per cent was paid during the period in controversy, January, 1949, to February, 1952. (Tr. 3)

Appellant denied that appellee was entitled to commissions at the rate of three per cent for this period, and, alleged among other affirmative defenses, that the original agreement was modified in January, 1949; that the parties entered into an accord and satisfaction in July, 1951; that the appellee is estopped from claiming further compensation; and that the original agreement was void under the Washington Statute of Frauds. (Tr. 19)

In 1946 appellee owned a paperboard machine located in New York and desired to install it in a

mill in the Pacific Northwest (Tr. 67). For many years appellant owned and operated a mill in Bellingham, Washington, which produced paper pulp and a by-product called screenings (knots and residue not usable in pulp) suitable as raw materials for making paperboard (Tr. 87).

Appellee and appellant entered into an agreement (Ex. 1, Tr. 9) on May 22, 1946, whereby a corporation, with a capitalization of $200,000.00, was to be formed, known as Bellingham Paper Products Company, (hereinafter called "Paper Products Company") with the appellee contributing his paperboard machine and $2,000.00 in cash, for a total value of $50,000.00, in payment of one-fourth of the capital stock, and appellant contributing $150,000.00 in cash for the other three-fourths of the capital stock. (Tr. 57, 58) Said agreement contained a provision to the effect that when the corporation was formed, the Paper Products Company and the appellee would enter into a five-year agency agreement whereby appellee would sell the products of the new corporation and receive three per cent commission on net sales as payment for his services, together with reimbursement of certain expenses.

The corporation was formed, a building was constructed to house the paper machine on land owned by appellant adjacent to its pulp plant, and the plant went into production in May, 1947. (Tr. 77, 78) The

Paper Products Company and the appellee agreed upon the terms of an agency agreement and reduced the same to writing (Ex. 3, Tr. 15), which included the pencil insert attached thereto, but the agreement was never signed (Tr. 58) by either party. Although plaintiff's Exhibit 3 was not signed, both parties agree that the terms set forth therein are the terms agreed upon (Tr. 58, 59). As appellee had previously been engaged in the paperboard and carton business in Tacoma for some time prior to 1946 this contract provided:

> "(4) Second party agrees to devote such time and effort to the making of said sales as shall be necessary to accomplish the same, and second party agrees to use due diligence and exercise the best of faith in carrying out and performing this contract. Second party further agrees that while this contract is in force and effect, he will not undertake or promote the sale or sales of like, similar, or competing commodities on behalf of any other company or person. Except those products which are manufactured and sold by him in plants in Tacoma, Wash., operated under the trade name of the Standard Carton Co." (Tr. 18)

The contract also provided:

> "(2) * * *. Should second party breach this contract in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors of the Company, the Board shall at any time after two (2) years from the date the mill of the Company commences production have authority to terminate the agreement by paying second party all commissions then due and

payable to him and by tendering him in exchange for a transfer of any stock then owned by him in the Company, to the Company or its nominee, the amount invested by him therein at the rate of One Hundred Dollars ($100) per share, plus any amount earned by the stock then owned by second party not theretofore paid second party in the form of dividends, it being the intention of this agreement that if any amount has been paid out of net earnings of the Company on account of its indebtedness or otherwise, that such sum so earned on second party's stock at the time of the cancellation of this agreement shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his stock or whether he will retain the ownership of his said stock in the Company; provided further, that the refusal of second party of such tender shall not affect the cancellation of this contract, and nothing herein contained shall be construed as authorizing second party to voluntarily terminate this contract and claim the benefits of this paragraph.

"Nothing above set forth in this paragraph shall be construed as a limitation upon or as affecting the right of either the Company or second party to terminate and end this contract for willful or intentional breach thereof by the opposite party. * * *" (Tr. 16, 17)

The original contract (Ex. 1, Tr. 9) contained other provisions pertaining to the new corporation borrowing an additional sum of $200,000.00 from a bank, to be used in constructing the paperboard mill, to be guaranteed by appellant and secured by a pledge of all the stock of the new company. This agreement also provided that appellant and the new corporation would enter into a lease agreement by

which the appellant would lease to the new corporation the land upon which the new plant would be built, would supply water, steam, power and electricity all at agreed figures. Such an agreement was later entered into. Also, a stock pledge agreement was entered into between the interested parties as contemplated and an option agreement which imposed restrictions upon the same and transfer by the parties to this action of their stock, with option to purchase to the party not selling.

Later in 1947 the appellant purchased the appellee's interest in Bellingham Paper Products Company for $135,000.00 in cash (Tr. 58, 141, 142) and dissolved the new corporation in December, 1947, taking over its assets and operating its plant as the Paperboard Division of the appellant corporation. Appellant assumed and agreed to pay and perform all obligations of the dissolved corporation. The appellee continued to do the same work for the paperboard division as he had formerly performed for Paper Products Company and received three per cent of the net sales as commission until December 31, 1948 (Tr. 58, 59).

During the month of December, 1948, (appellee's version—January, 1949, appellant's version) the appellee *voluntarily* reduced his compensation from three per cent commission to one and one-half per cent commission. (Tr. 95, 109) A principal issue in

the case is as to the binding effect of this reduction. Appellee had a conversation with Mr. Roberg, Vice President of appellant corporation, who had general supervision over the Paperboard Division, in Mr. Roberg's office, wherein appellee stated to Mr. Roberg *"that the profits of the Paperboard Division were not very substantial"* and *"that as a temporary measure"* the appellee *"would reduce the compensation to one and one-half per cent until the operations became profitable."* (Tr. 96, 97) Mr. Roberg accepted this proposal on behalf of the appellant. Appellee confirmed his voluntary reduction with Mr. Rogers, the Treasurer and chief accounting officer of appellant. (Tr. 276) The subject of this reduction was first raised by appellee. (Tr. 97) At this time the paperboard division was not making any money which appellee knew (Tr. 260) and which was the reason for the voluntary reduction. The appellee was paid three per cent commission through the month of December, 1948, and one and one-half per cent commission commencing January 1, 1949, through the month of February, 1952. (Ex. A-8)

In 1950 or early 1951 (Tr. 98, 249, 250) appellee purchased another paperboard machine in Canada on his own account and sought to persuade appellant to purchase the same from appellee and install it in the Paperboard Division, which appellant declined to do. (Tr. 98, 99) The appellee then organ-

ized a paperboard company on his own account, known as California Paperboard Company, and in early 1951, started constructing a plant at Richmond, California, to house the machine. (Tr. 100) This action amounted to a breach of the terms of his employment agreement (Ex. 3) This paperboard mill went into production in November, 1951 (Tr. 106) Appellant did not want appellee to represent its paperboard division and another competing board mill at the same time and negotiations were begun in the first quarter of 1951 to select a date for the termination of appellee's connection with appellant. (Tr. 98, 99, 100, 101, 228, 249, 267) Appellee suggested a termination date of December, 1952, and appellant desired a termination date of September 1, 1951 (Tr. 101, 102, 103, 228-238)

In pressing for his contention that the termination date should be December, 1952, appellee wrote a letter dated July 12, 1951, pointing out that he had previously voluntarily reduced his commission rate. (Ex. A-1) Thereafter appellee and Mr. Lawson Turcotte, President of appellant corporation, had a conference in which it was agreed that appellee's compensation would be terminated March 1, 1952. (Tr. 101) As to the other details of what was agreed upon at that conference there is a dispute in the evidence.

Mr. Turcotte's version is that it was agreed that

appellee's services would terminate as of September 1, 1951, but that appellee would continue to receive commissions until March 1, 1952, at the 1½% rate, in full payment and satisfaction for all of the appellant's obligations to the appellee. Appellee's version is that the only item agreed upon was that the date of termination would be March 1, 1952. (Tr. 101, 109-113, 234, 240)

The appellee moved his office from appellant's premises in early September of 1951 and was never seen again by the management of appellant organization until some time after March 1, 1952. (Tr. 218, 219, 243, 266, 277)

On September 21, 1951, appellee wrote to Mr. Turcotte, President of appellant as follows: (Ex. A-11)

> "The Sales Commission check for August was received and I thank you for it.
>
> "An item that has apparently been overlooked is the issuing of a check for my expenses during the month of June. This was quite an item as it covered the convention of the Pacific Coast Association at Victoria, B. C.
>
> "There will be no expenses charged for August, or thereafter, but I would appreciate the check for June."

On November 21, 1951, appellee wrote a letter to appellant stating in part as follows: (Ex. A-2)

> "Apparently your accounting department has overlooked sending me a commission check for September and October.
>
> "As I recall our agreement, a figure of one and one-half per cent commission on Board Mill sales would be paid me for six months,

starting with the first of September."

Thereafter the appellee wrote a letter on April 7, 1952, stating in part: (Ex. A-3)

> "Apparently your staff has overlooked sending me the commission check for February, we had agreed that this would be the last one."

The following day, April 8, 1952, appellant wrote the following letter over its president's signature: (Ex. A-4)

> "Enclosed herewith is our check, together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon."

The check enclosed with that letter (Ex. A-5) was at the rate of 1½% and was received and cashed by appellee.

Nothing further was heard from appellee by appellant until appellee's letter of June 5, 1953 (Ex. A-6), wherein appellee states in part:

> "You may recall that I voluntarily suggested that I take one and one-half per cent or half the agreed amount starting January 1, 1949, *'until the operation became profitable'*."

In that letter, appellee, for the first time, makes demand for an additional one and one-half per cent commissions on all sales from January 1, 1949, through the month of February, 1952 (Tr. 110, 228-234, 277)

Appellee thereafter instituted this action seeking to recover an additional one and one-half per cent

commission on the net sales of the Board Division from January 1, 1949, to March 1, 1952. No evidence was presented to indicate that the Paperboard Division was ever a profitable operation.

The trial judge made a finding that the plaintiff did not mean what he testified to on page 97 of the transcript of the record but that he meant he would *postpone* the collection of the remaining one-half of his commissions. (Tr. 38)

QUESTIONS RAISED

1. When appellee testifies that he voluntarily agreed to reduce his commissions from three per cent to one and one-half per cent until the operations became profitable, is a finding by the trial judge, that such an agreement was only a temporary *postponement* of the collection of the remaining one and one-half per cent, clearly erroneous?

Trial Judge's answer—No.

2. Can two parties to an executory contract make a binding modification of that contract without fresh consideration?

Trial Judge's answer—No.

3. When two parties have entered into an agreement for the termination of a contract and the payor has paid the sum of money fixed for the termination of that contract, and the same has been accepted by the payee as full payment of that contract, can the

payee repudiate the agreement and sue for a greater amount?

Trial Judge's answer—The payee can.

4. When parties orally agree on the terms of a contract which by its terms cannot be performed within one year and reduce the same to writing but do not sign such contract, is that contract void under the Statute of Frauds of the State of Washington as one which is not to be performed within one year.

Trial Judge's answer—Such contract is not void under the Statute of Frauds of the State of Washington.

SPECIFICATIONS OF ERROR

1. The finding of the Trial Judge that the agreement of January 1949 was merely a postponement of the collection of one-half of appellee's commissions, as set forth in Finding X (Tr. 38) is clearly erroneous and not supported by any evidence whatever.

2. The findings and conclusions of the Trial Judge that the original agency agreement was not modified by the agreement of January, 1949, and that such modification was not binding on both parties are clearly erroneous (Findings of Fact Nos. X, XIII, XIV; Conclusions of Law Nos. II, IV), in that under the law of Washington fresh consideration

is not required for the binding modification of an executory contract, and further that appellee did receive consideration for the reduction of his commission.

3. The findings and conclusions of the Trial Judge that the agreement of July, 1951, by which appellee's employment was terminated, and his compensation was to cease as of February 29, 1952, did not constitute an accord and satisfaction of all matters arising out of his employment, and that appellee was not estopped, after performance thereof by appellant, from bringing suit on the original agency agreement, are clearly erroneous (Findings of Fact Nos. XI, XIII, XIV; Conclusions of Law Nos. II, III, IV) in that appellant desired to terminate his compensation at an earlier date, but was induced to continue his commission by appellee's representations as to his voluntary reduction therein, and his concealment of the fact that he claimed the right to additional compensation.

4. The finding and conclusion of the Trial Judge that appellant had failed to sustain its burden of proving its defense of the Statute of Frauds as to Exhibit 3 is clearly erroneous (Finding of Fact No. XIV; Conclusion of Law No. III), in that under the law of Washington a contract which, by its terms, may not be performed within one year, is void un-

less in writing and signed by the party sought to be charged.

5. The Trial Judge erred in entering judgment for appellee and against appellant, for the reason that said judgment is contrary to the law and the evidence, in the respects alleged in Specifications of Error 1 through 4 herein.

ARGUMENT ON SPECIFICATION OF ERROR NO. 1

Summary of Argument

The finding of the Trial Court that the appellee's proposal was to the effect that he would postpone the collection of one-half of his compensation was clearly erroneous and is not supported by an iota of evidence.

Appellee's Compensation Was Reduced

Finding of Fact No. X (Tr. 38) states, in part, as follows:

> "That in December, 1948, or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound Pulp & Timber Co. that he would temporarily reduce his commissions to one and one-half per cent of net sales of the Paperboard Division of defendant corporation, and would in effect, *postpone* collection of the remainder thereof." (emphasis supplied)

The trial judge thus created an entirely new and different agreement which was neither pleaded by the appellee nor contemplated by the parties.

Not an iota of evidence was introduced which would support the Trial Judge's finding.

The appellee, in answer to questions propounded by his own counsel, described the transaction as follows:

> "Well, I said to Mr. Roberg that the profits of the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half per cent until the operations became profitable." (Tr. 97)

On cross-examination the following testimony was given:

> "Q. Then I believe you told us sometime in December of 1948 you voluntarily reduced your commission from three per cent to one and one-half, is that correct?
> "A. I voluntarily suggested a temporary reduction of that amount at that time, yes." (Tr. 109)

In the appellee's letter of July 12, 1951 (Ex. A-1), he states:

> "As you know I voluntarily reduced my sales commission from 3 per cent to one and one-half per cent in January of 1950."

The appellee, by oral testimony, stated that the year in above quotation from Exhibit A-1 was in error and that it should have been January 1, 1949. (Tr. 123, 124)

On cross-examination the following question and answer appear on page 109:

> "Q. On January 1, 1949, you were agreeable to receiving 1½% commission — at least

for that month — rather than three per cent?

"A. Yes."

If appellee had intended only to temporarily *postpone* the collection of one-half of his commissions he would not have so answered the foregoing question in the affirmative.

On page 111 we find the following statement by the appellee:

"Q. So that it is your recollection that the only conversation and the only understanding or agreement made was with Mr. Roberg?

"A. Mr. Roberg. I think that we talked about it. A matter of, oh, four to six months later I suggested that it might be increased. I didn't suggest all the way at that time, as I recall it. Nothing was done about it."

If the appellee had only agreed to a postponement of the collection of his earnings he would not have suggested that his earnings be increased, and that by but a part of the difference between one and one-half and three per cent.

In the appellee's letter of June 5, 1953 (Ex. A-6) he states:

"You may recall that I voluntarily suggested that I take 1½% or half of the agreed amount starting January 1, 1949, *'until the operation became profitable'.*"

"It is my considered opinion that your records, and/or an independent audit, will disclose the fact that the board mill operation was profitable for the major portion, if not all, of the time since that date."

If the appellee had in fact only made an agree-

ment to *postpone* the collection of his commission he would not have been concerned about the period of time during which the operation was profitable. If he in fact believed he was entitled to the other one-half of his commission he would not have made the assertion that at least a portion of the time the operation was profitable.

Rule 52 of the Federal Rules of Civil Procedure provides:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses."

Appellant contends that the finding of the Trial Court is clearly erroneous. There is neither a suggestion nor a permissible inference, much less a preponderance of the evidence, that appellee's collection of one-half of his compensation was to be postponed or deferred. He himself did not so testify. No question of credibility is involved. The plain, simple English language used by the appellee in describing the agreement he made with the appellant discloses the clear error committed by the trial judge. The appellee simply stated his case, i.e. that the appellant should have restored his commissions to three per cent as soon as the operation became profitable. (Tr. 97, Ex. A-6) However, the appellee made no attempt whatever to present any evidence as to whether the operations ever became profitable. The

burden of proof was on the appellee to prove this fact if it were true. The books and records of appellant were available to the appellee under the discovery rules and could have been subpoenaed if the appellee had desired to prove the profits of the Paperboard Division. Not an iota of evidence was introduced to prove that the operations ever became profitable. Under such a state of the record the appellee is not entitled to recover and the Trial Court's Finding of Fact which, in effect, made a new contract which neither of the parties ever contemplated, is clearly erroneous.

ARGUMENT ON SPECIFICATION OF ERROR NO. 2

Summary of Argument

Appellee and appellant made an oral modification of the existing executory contract with reference to appellee's compensation during the month of January, 1949, reducing his future commission from three per cent to one and one-half per cent. The trial judge held there was no valid modification because no new consideration was promised to or received by appellee. (Findings of Fact Nos. X, XI) Such finding is clearly erroneous. Under the decisions of the State of Washington, and the law generally elsewhere, including the law in the federal jurisdiction, such a modification needs no fresh consideration to be binding upon the parties.

The Contract Was Executory

Up until December 31, 1948, appellee was paid three per cent commission pursuant to his agreement with appellant. (Par. VIII of Complaint, Tr. 5) As of that date appellee, at his own suggestion, agreed to reduce his future commissions from three per cent to one and one-half per cent until the Paperboard Division's operations became profitable. (Tr. 97, 109, Ex. A-6) It is emphasized that as to future commissions the contract of employment was entirely executory. This was not an agreement to reduce appellee's compensation on sales already made, but the agreement dealt solely with commissions to be earned in the future.

It is appellant's contention that this modification constituted a new binding agreement, superseding the previous contract. The trial court held that there must be consideration for a modification of an existing executory contract. The authorities show that the trial court was in error.

No Fresh Consideration Is Required for a Binding Modification of an Executory Contract

The leading Washington case establishing this proposition is *LaPlante v. Hubbard,* 125 Wash. 621, 217 Pac. 20 (1923). In that case there was a contract between the plaintiff as seller and the defendant as buyer for the cutting and delivery of railroad

ties from a certain tract of land. After a part of the ties had been cut and delivered the defendant buyer learned that he would require less than the amount of ties which could be produced from the tract of land. It was then agreed between the parties that the buyer would pay for the ties already cut but not yet delivered by plaintiff seller at the contract rate and that the balance of the contract would be cancelled. Some time later plaintiff seller sued defendant buyer seeking to recover among other items, damages resulting from the buyer's failure to purchase the balance of the ties that could have been cut from the tract of land, as buyer was obligated to do under the original contract. It was urged that there was no consideration for the agreement cancelling the balance of the contract and that therefore plaintiff was entitled to recover in accordance with the terms of the original contract. The court stated (125 Wash. at 625):

> "We do not think it is or should be the law that any new consideration was required to make the second agreement enforceable. Every day in the business world men relieve one another from the performance of certain agreements, and it has never been thought that any new consideration was necessary to the validity of such agreements. The second agreement was a new contract, taking the place of the first, which had not been executed by either of the parties, and the first was a sufficient consideration for the second.
>
> "In 6 R.C.L. p. 923, it is said:

" 'It is always competent for the parties to rescind a subsisting simple contract by a naked agreement to that effect. So far as the contract remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side, although a consideration is necessary to release a right of action which has accrued for a breach of the contract. Though there is authority to the effect that a new consideration is essential to substitute one contract in the place of another, the correct rule is that there is a sufficient consideration when a new contract is substituted for an old one. The mutual, unexecuted undertakings of an existing contract are a sufficient consideration for the cancellation of such contract and the substitution of a new one with different terms, and it is immaterial that, for a moment during the interval, there is technically a breach of the old agreement, since by the new agreement both parties treat the old one as an existing contract, and mutually agree to a rescission of it.'

"See, also, to the same effect 13 C. J. 592."

Other Washington cases reaffirm the proposition under consideration. In *Hunter's Cattle Co. v. Carstens Packing Co.*, 129 Wash. 377, 225 Pac. 68 (1924) plaintiff and defendant contracted whereby plaintiff would render certain services and furnish hay to cattle owned by defendant for a consideration of $9.00 per ton of hay so furnished. The original contract provided that the hay was to be placed in feed boxes. During the performance of this agreement it was orally modified so that plaintiff was required only to spread the hay in the corral. The action was to recover the agreed price for the sup-

plies and services rendered during the life of the contract and the defense was that plaintiff had breached the contract by failing to supply the hay in boxes. It was argued by defendant that the claimed modification was void because without consideration. The court stated (129 Wash. at 378):

> "At the time of this modification of the original contract, it was clearly executory in a very large measure, both on the part of the appellant and respondent; the cattle not only then still being in the care of respondent for appellant, but it being then apparent that such continuing performance of the contract would extend over a considerable time in the future."

The court stated the rule as follows:

> "* * * while a contract remains executory in a substantial measure on both sides, an agreement to annul or modify on one side is a consideration for an agreement to annul or modify on the other side. Plainly, we think such was the condition attending the performance of this contract at the time of its modification by the parties." (Citing *LaPlante v. Hubbard,* supra)

In *Inman v. Roche Fruit Co.,* 162 Wash. 235, 298 Pac. 342 (1931) there was a written contract for the sale of cherries which provided that packing should be done by the sellers. There was a subsequent oral modification by which it was agreed that the buyer would perform the packing. The plaintiff seller sued for a balance due on the purchase price and the defendant buyer defended on the ground of breach of the obligation of the seller to pack. As against the contention of the buyer that the modi-

fication was not binding because of absence of consideration, the court said (162 Wash. at 241):

> "* * * The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract." (Citing a number of Washington cases)

A recent case, *Meyer v. Strom,* 37 Wn. (2d) 818, 226 P. (2d) 218 (1951) cites and relies upon the *Hunter* and *Inman* cases, supra. That case involved a contract for the lease of certain well drilling equipment. While the contract was still executory, a reduction of the rental charges was agreed upon between the parties. The lessor contended that the modification was not supported by consideration and was therefore not binding. The court recited that the lease was executory on both sides at the time of the modification, and stated (37 Wn. (2d) at 829):

> "Under these circumstances, the original consideration was sufficient to support the subsequent modification." (Citing cases)

The rule of these cases was most recently reaffirmed by the Washington Supreme Court in *Nielson v. Northern Equity Corp.,* 147 Wn. Dec .155, 286 P. (2d) 1034 (1955), citing the *LaPlante, Hunter* and *Meyer* cases, supra.

In the case at bar there is no contention that the plaintiff agreed to receive a lesser commission for sales already made by him. The agreement for a

lesser commission operated only "in futuro" from the date of the modification. *As to that portion of the original contract modified by the subsequent agreement on the part of plaintiff to accept a lesser commission, the original contract was wholly executory.* The rule of the above cited cases would thus apply.

The cases in the federal jurisdiction are in accord. In *Savage Arms Corp. v. United States,* 266 U. S. 217, 69 L. Ed. 253, the Court referred to the rule as being so elementary as to need no authorities, in the following language at page 220:

> "* * * It is enough to say that the parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement, without fresh consideration. The release of one is sufficient consideration for the release of the other. If authority for a rule so elementary be required, see, for example: *Hanson & Parker v. Wittenberg,* 205 (221) Mass. 319, 326, 91 N. E. 383; *Collyer v. Moulton,* 9 R. I. 90, 92, 98 Am. Dec. 370; *McCreery v. Day,* 119 N. Y. 1, 7, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; *Dreifus v. Columbian Exposition Salvage Co.,* 194 Pa. 475, 486, 75 Am. St. Rep. 704, 45 Atl. 370."

The Supreme Court of the United States has affirmed the language used in the *Savage* case in *Hartsville Oil Mill v. United States,* 271 U. S. 43 at p. 50, 70 L. Ed. 822 at p. 827.

In *Mid-State Products Co. v. Commodity Credit*

Corp., 196 F. (2d) 416 (7 Cir. 1952) the court stated at p. 420:

> "There can be no doubt of the right of the parties to an executory contract to amend its provisions. As the Court said in *Savage Arms Corporation v. U. S.,* 266 U. S. 217, 220, 45 S. Ct. 30, 31, 69 L. Ed. 253 '* * * parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement without fresh consideration. * * *' * * *"

See also *Abrams v. Astor,* 170 F. (2d) 544 (2 Cir. 1948)

Consideration Moved to Appellee

If, notwithstanding the foregoing authority, consideration is deemed required to make the modification binding, there was consideration aplenty. The appellant had the privilege of discharging the appellee at any time had it chosen so to do, but instead relied in good faith upon the modification for over three years.

It must be remembered that the terms of Exhibit 3 do not specify the duration of that agreement. The parties did not incorporate a five-year period in Exhibit 3 as they had stated they would do in Exhibit 1. Paragraph 5 of Exhibit 3 clearly states that that agreement contains all of the terms of the agreement. So we have a contract for personal services without a termination date. Such contracts are terminable at the will of either party. *Davidson v.*

Mackall-Paine Veneer Co., 149 Wash. 685, 271 Pac. 879 (1928); Restatement of Contracts, Sec. 32 pp. 40-41, *Illustration* 1; 12 Am. Jur. 860, "Contracts," Sec. 305; 17 C.J.S. 887, "Contracts," Sec. 398.

Appellee was fully aware that the Paperboard Division was not a profitable venture and was so concerned by this fact that he proposed to reduce his compensation by one-half. (Tr. 97, Ex. A-6) There were several courses of action open to appellant to correct this situation, many of which would have worked to appellee's detriment. In addition to discharging appellee, appellant could have simply closed the Paperboard Division and appellee would have had no recourse. Any number of other courses of action could have been taken. Appellant, however, did not take these courses of action but relying in good faith upon appellee's proposal to reduce his commissions by one-half continued to keep him in its employ for over three years thereafter. Therefore, the fact that appellant continued to keep appellee in its employ is sufficient consideration for appellee's promise to take a lesser rate of pay.

In summarizing appellant's contentions under specification of Error No. 2, the evidence shows without dispute that appellee and appellant modified the terms of the contract with regard to appellee's compensation. Thereafter, the modified con-

tract was in full force and effect and appellant's obligation to pay three per cent commission was cancelled and of no further effect. Appellant has fully complied with the contract as so modified and appellee cannot now repudiate the modified contract and insist upon enforcing the original contract. The District Court was thus in error in holding that after appellant had in good faith relied upon the terms of the modification for over three years, appellee could repudiate the modification.

ARGUMENT ON SPECIFICATION OF ERROR NO. 3

Summary of Argument

When appellee and appellant disagreed as to whether the appellee should be the sales representative for appellant's products and at the same time organize and finance a competing company, the parties entered into a binding accord and satisfaction with reference to the termination of appellee's relationship with appellant. That accord and satisfaction was fully carried out in all of its terms by appellant and appellee and is now estopped from repudiating his agreement.

The Agreement of July, 1951, Constituted an Accord and Satisfaction of All Obligations Between the Parties

When appellee began organizing the competing California Paperboard Company appellant did not want appellee to continue in its organization as ap-

pellant's sales representative and negotiations were begun to arrange for a termination of appellee's connection with appellant. (Tr. 98, 99, 100, 101, 228, 249, 267) A dispute arose as to the terms and conditions under which such termination should take place. It must be remembered that appellee's financial interest in the board mill had been terminated when appellant purchased in November, 1947, appellee's $50,000 stock investment for $135,000. The only interest which appellee had thereafter was that of an employee working on commission. Appellee wanted his termination date to be fixed as of December, 1952, and appellant desired a termination date of September 1, 1951. (Tr. 101, 102, 103, 228-238)

In pressing his contention that the termination date should be December, 1952, appellee wrote the letter dated July 12, 1951 (Ex. A-1), in which appellee pointed out that he had voluntarily reduced his commissions from three per cent to one and one-half per cent. This was a factor which appellee wanted to be taken into consideration in arriving at a termination date. Thereafter appellee and the President of appellant corporation had a conference in which it was agreed that the termination date of appellee's services would be September 1, 1951, but that his compensation of one and one-half per cent would continue on for six months, until

February 29, 1952. This is confirmed by the letters written by appellee thereafter. In his letter of November 21, 1951, appellant states (Ex. A-2):

> "As I recall our agreement, a figure of one and one-half per cent commission on boardmill sales would be paid me for six months, starting with the 1st of September."

This letter constitutes a clear written admission that the agreement for termination provided that appellee would work until September 1, and that thereafter he would receive six months pay without having to work for the same, as contended by appellant.

On April 7, 1952, appellee wrote a letter to appellant (Ex. A-3) stating:

> "Apparently your staff has overlooked sending me the commission check for February, we had agreed that this would be the last one."

Certainly this letter acknowledges the fact that under the termination agreement the last money appellee was to receive from appellant was his commission check for February, 1952. If appellee had any other intention it was a secret intent not disclosed to appellant.

On April 8, 1952, appellant wrote to appellee (Ex. A-4) stating:

> "Enclosed herewith is our check together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon."

The check for the February commission was enclosed with that letter and cashed by appellee (Ex. A-5)

Upon receipt of Ex. A-4 and A-5 appellee was advised that the check was the last money he was to receive from appellant pursuant to their agreement. Appellee accepted the check and cashed it. Thus the entire transaction was completed and consummated. The authorities are in accord in holding that the courts will not disturb an agreement which has been consummated and carried out. The District Court, however, erred in holding to the contrary. It is important to note that appellee himself did not testify that he disclosed to appellant any claim to recover commissions at the original rate, in the negotiations leading to his termination, or at any time prior to writing his letter of June 5, 1953. (Ex. A-6)

The Law of Accord and Satisfaction

It is the law of Washington that

> "* * * where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed when tendered in satisfaction operates as an accord and satisfaction."

James v. Riverside Lbr. Co., 121 Wash. 130, 133, 208 Pac. 260 (1922)

> "An accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principles of contract. * * * To create it, there must be a meeting of the minds upon the subject and an

intention by both parties to make such an agreement."

Boyd-Conlee Co. v. Gillingham, 44 Wn. (2d) 152, 155, 266 P. (2d) 339 (1954)

The assent of the creditor to an accord and satisfaction may be manifested by express agreement to receive the tendered amount in full satisfaction, or by acceptance of the amount, knowing "that the debtor intends the check to be considered as full payment." *Graham v. N. Y. Life Ins. Co.,* 182 Wash. 612, 47 P. (2d) 1029 (1935).

In this case the evidence establishes an accord and satisfaction in that appellee made an express agreement in July, 1951, to accept commissions at the rate of one and one-half percent for a period of six months after his services were terminated. If independent consideration is needed to support an accord and satisfaction this would certainly be sufficient. Appellee's letter of July 12, 1951 (Ex. A-1), which preceded the O'Reilly-Turcotte conference, establishes that the entire matter of O'Reilly's rights under the employment agreement were under consideration. Appellee now contends that he did not intend to compromise the matter of his rate of commission, but does not claim that he disclosed his intention in that regard to appellant. That being the case, his secret intention to make a further claim in the future would not prevent a meeting of the minds so as to constitute an accord. In *Bond v. Wie-*

gardt, 36 Wn. (2d) 41, 216 P. (2d) 196 (1950) the Washington Supreme Court said at p. 54:

> "The unexpressed understanding of one of the parties to a contract as to its meaning is usually of no legal significance (Restatement, Contracts, p. 74, Sec. 71), and testimony tending to show secret, undisclosed intention will ordinarily be excluded, as it cannot be used to overthrow the effect of the intention actually made manifest in the contract."

This principle is declared in 12 Am. Jur. 516, "Contracts", Sec. 19, as follows:

> "The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts and not from an unexpressed intention. It is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions which may be wholly at variance with the former."

A closely analogous case on this point is that of *Austin v. Union Lbr. Co.,* 95 Wash. 608, 164 Pac. 245 (1917). There a logger sold and delivered a raft of logs to the defendant, at an agreed price per thousand feet board measure. He had scaled the logs at 71,384 feet. The defendant scaled them at 39,878 feet. The evidence showed that the logger had gone to the defendant's office, been presented with and examined a statement of account showing the defendant's computations as to the contents of the raft, and certain countercharges against him, and had accepted and cashed a check in the amount of the

balance, without disclosing that he had scaled the logs differently, or that he claimed any other amount due. Suit was brought by the logger's receiver for the amount claimed due on the sale of the logs, based on the logger's computations. The defendant pleaded an accord and satisfaction.

The Washington Supreme Court said (95 Wash. at 610-11):

> "If it can be gathered from the transaction of the parties that a settlement and satisfaction was intended, that a balance is actually struck, and that the one pays and the other accepts without protest or objection of any kind, it is viewed in law as a closed account notwithstanding one of the parties may secretly intend to, and thereafter does, treat the account as still an open one; * * *"

The applicability of that ruling to this case is clear; in each case the debtor rendered the creditor an account showing the amount due and the creditor received the amount shown due by the account without protest or objection, and with knowledge that it was intended in full satisfaction. In each case the creditor harbored a secret intent to make a further claim, and in each case the law gives no effect to that secret intent.

Appellee's apparent assent to the compromise agreement as a complete settlement of his rights arising out of the employment agreement, is therefore operative to the exclusion of his secret intentions, and the compromise agreement constituted

an accord which has now been fully executed by payment and acceptance of the sums agreed upon.

If, nevertheless, legal effect is given to appellee's secret intention, so as to prevent the compromise agreement from becoming an accord, it is clear that the exchange of correspondence of April 7 and 8, 1952 (Ex. A-3, A-4), following by appellee's cashing the check for the February commission (Ex. A-5), constitutes an accord and satisfaction by acceptance, knowing that appellant intended the check to be considered as a full and final payment.

Appellant Having Performed Under the July, 1951, Agreement, Appellee Is Estopped from Repudiating That Agreement

It is stated in 12 Am. Jur. 987, "Contracts", Sec. 408:

> "After one party has performed, and the other party has accepted the performance of, a parol agreement modifying a written contract, it is too late to raise the question of a want of consideration for the modification."

In 17 C.J.S. 862-3, "Contracts", Sec. 376, it is stated:

> "Where a modified agreement has been fully executed, it will not be disturbed for a want of consideration, and there are cases which hold that, where one party has performed a modified agreement to such an extent that it would work a fraud or injury on the other party to repudiate it, the modified contract will be sustained."

This rule was followed in *Vigelius v. Vigelius,* 169

Wash. 190, 13 P. (2d) 425 (1932). In that case a husband and wife entered into a written separation agreement prior to their divorce. The agreement provided as follows:

> "The husband shall also at all times during the joint lives of the wife and himself, until their divorce and remarriage by the wife, pay to her on the first day of each and every month the sum of seventy-five dollars, as her sole and separate estate."

Later, the parties entered into an oral modification of this written agreement whereby the husband agreed to pay a lesser sum per month than was stipulated in the original agreement. After reciting the rule that a contract executory on both sides may be modified without new consideration, the court went on to state (169 Wash. at 193):

> "There is another general rule, well stated in the text of 13 C.J. 592, which, we think, is controlling in our present inquiry, as follows:
>
> " 'Where a modified agreement has been fully executed, it will not be disturbed for a want of consideration * * *.'
>
> "This statement of law has support not only in the decisions there cited, but also in the decisions rendered since the publication of that volume of Corpus Juris. *Maxwell v. Graves,* 59 Iowa 613, 13 N. W. 758; *In re Lamb's Estate,* 140 Iowa 89, 117 N. W. 1118, 18 L.R.A. (N.S.) 226; *Gray &Sons v. Satuloff Bros.,* 213 Ala. 526, 105 South. 666; *Davis v. Culmer,* 221 Mo. App. 1037, 295 S. W. 803; *State v. American Surety Co.,* 137 Ore. 394, 300 Pac. 511, 2 P. (2d) 1116; *Julian v. Gold,* 3 P. (2d) (Cal.) 1009; 1 Page on Contracts (2d. Ed.), Sec. 582."

See, also, *Fuller v. Deacon,* 172 Wash. 489, 30 P.

(2d) 843 (1951), and *Meyer v. Strom,* 37 Wn. (2d) 818, 226 P. (2d) 218 (1951) *supra,* where the court said, p. 829:

> "Moreover, since the agreement, as modified, had been fully executed subsequent to the modification and prior to the suit, we would not, in any event, disturb it for a want of consideration. *Vigelius v. Vigelius,* 169 Wash. 190, 13 P. (2d) 425; *Fuller v. Deacon,* 172 Wash. 489, 20 P. (2d) 843."

The *Meyer* case was cited by our Supreme Court in December, 1953, in *Johnson v. Peterson,* 43 Wn. (2d) 816, 264 P. (2d) 237, where the court said:

> "Also, the agreement, as the jury must have found it was modified, had been fully executed subsequent to the modification and prior to suit, by the delivery of the deed and payment of the price. Consequently, we would not, in any event, hold the modification invalid for want of consideration. *Meyer v. Strom,* 37 Wn. (2d) 818, 828, 226 P. (2d) 218 (1951), and cases cited."

In *Douglas County Mem. Hosp. Assn. v. Newby,* 45 Wn. (2d) 784, 278 P. (2d) 330 (1954), the defendant was indebted to the plaintiff hospital in the amount of $715.86. It was agreed between the parties that the defendant would pay the sum due in installments of $20 per month over a period of three years. After the agreement had been in effect for over six months and the defendant had been making payments in substantial compliance with the contract, the plaintiff demanded that the defendant execute a note providing for interest on the amount then due which it could discount at the bank. The

trial court held that the written agreement whereby the defendant agreed to pay $20 per month was not binding on the plaintiff because of lack of consideration. The appellate court cited the *Vigelius* case, *supra,* and described the basis of its holding in that case as follows (45 Wn. (2d) at 793):

> "* * * the former wife was estopped to deny that there had been a valid consideration for the modifying agreement after having accepted the payments called for in that agreement for twelve years."

The court held in the *Douglas County* case that the plaintiff was estopped to deny a valid consideration for the installment contract. It went on to say (45 Wn. (2d) at 796):

> "* * * Respondent, having accepted from appellant the payments called for in the written contract for almost a third of the period contemplated by the parties, is in no position to urge that there was no consideration for the contract."

These authorities are also in point upon appellant's second specification of error since appellant had fully complied with the modified agreement before suit was started.

Estoppel has been defined by the Washington Supreme Court as "A preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment of another who, in reliance on such act or conduct, has acted upon it." *Reynolds v. Travelers Ins. Co.,* 176 Wash. 36, 45, 28 P. (2d)

310 (1934), recently approved in *Bowman v. Webster,* 44 Wn. (2d) 667, 269 P. (2d) 960 (1954).

The case of *Mall Tool Co. v. Far West Equip. Co.,* 45 Wn. (2d) 158, 273 P. (2d) 652 (1954) involves similar circumstances. There, Mall Tool had appointed Far West its exclusive distributor in a designated area, which distributorship entitled Far West to certain commissions on all sales of Mall's products in the area, regardless of who made the sales. The distributorship was terminable at will. Mall wrote Far West that, effective the following month, another distributor would be appointed for a portion of the Far West area, and that Far West would receive no further commission with respect to sales in that area. Far West protested that it was entitled to thirty days notice, and subsequently did receive its authorized commission on sales made during that period. The court said (45 Wn. (2d) at 168):

> "When Far West stood by while Mall was paying a twenty five per cent commission to * * * (the new distributor) * * * which included the five per cent to which Far West claims it was entitled, without an unequivocal statement of its position, it waived any rights it might have had in connection with shipments subsequent to January 31, 1947, and is now estopped from asserting a claim for commissions on sales subsequent to that date."

In summarizing, it is appellant's contention that when the parties agreed as to the conditions under

which appellee's employment would be terminated, such agreement covered all obligations between the parties. The final agreement was in fact a compromise on the part of both parties. Appellee wanted to remain on the payroll until December, 1952, and offered as a factor in favor of his retention that he had voluntarily reduced his commissions by one-half in January of 1949. Appellant wanted to take appellee off the payroll as of September 1, 1951. The result was a compromise. Appellee was to work until September 1, 1951, but would remain on the payroll for six months thereafter (Ex. A-2). Appellee thus used the fact of his voluntary reduction of pay to gain compensation for six months beyond that which appellant was willing to give him. (Tr. 235) This amounts to a true accord and satisfaction, compromising all differences between the parties. The terms of the accord and satisfaction have been fully carried out. Appellee left appellant's premises shortly after September 1, 1951, and went to Richmond, California, to work on his new mill. Appellant continued to pay commissions for an additional six months. It was then too late for appellee to go back and try to make a better deal.

ARGUMENT ON SPECIFICATION OF ERROR NO. 4

Summary of Argument

The trial judge erred in holding as a matter of law that the unsigned contract, Plaintiff's Exhibit 3, calling for performance for a period in excess of one year, was not void by reason of the Statute of Frauds.

The Contract Was Not Signed

It is admitted that the original agency agreement, Plaintiff's Exhibit 3, was never signed by any of the parties. (Tr. 58) Despite this fact the trial judge found, in Finding of Fact No. XIV, that the appellant had failed to sustain its burden of proof as to the Statute of Frauds.

The Statute of Frauds in the State of Washington is found in RCW 19.36.010, which provides as follows:

> "In the following cases any agreement, contract and promise, shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized;
>
> "(1) Every agreement that by its terms is not to be performed in one year from the making thereof; * * *"

It will be noted that Exhibit B to appellee's complaint (Pl. Ex. 3) provides, in paragraph II, that the appellant could not terminate the agreement un-

til two years after the mill commenced production. The conditions under which the appellant could then terminate the appellee's employment are set forth in that paragraph. It is thus clear that Exhibit 3 is an agreement that by its terms is not to be performed within one year from the making thereof. As such that agreement is void by reason of the Statute of Frauds unless it is signed by the party to be charged. This was not done.

It is true that where a corporate resolution names all of the terms of the contract and is *signed,* such resolution may satisfy the Statute of Frauds. *Western Timber Company v. Kalama Riv. Lbr. Co.,* 42 Wash. 622, 85 Pac. 338 (1906). However, in this case, although Exhibit 3 was presented to the Board of Directors and the minutes of the meeting referred to the agreement, those minutes were never signed. Further, where a contract is not completely set forth in a corporate resolution, then the contract is not "a contract in writing." *Aall v. Riverside Irrigation Dist.,* 157 Wash. 442, 289 Pac. 22 (1930). Where the resolution is not fully signed it does not constitute a contract in writing within the meaning of the Statute of Frauds. 5 Fletcher Cyclopedia (1952, Rev. Vol.) Sec. 2206.

Thus we have Exhibit 3, without the signature of the party to be charged or any substitute therefor which would provide a signature.

Regardless of what the law may be in other jurisdictions, in the State of Washington the length of time contemplated by the parties for performance of a contract governs the application of the Statute of Frauds.

In *Fish Clearing House v. Melchior, Armstrong Dessau Company,* 174 Wash. 539, 25 P. (2d) 381 (1933) a fish broker sued to recover commissions on the defendant's purchases of salmon from a particular producer. The defendant had agreed by oral contract to pay the plaintiff one cent per pound of salmon purchased from the particular producer involved. The plaintiff argued that the contract was not within the Statute of Frauds because, in effect, the defendant could terminate the contract at any time by not purchasing fish from the producer. The Court, nevertheless, held that the parties contemplated performance for more than one year. Therefore the contract was within the Statute of Frauds and the Court stated, at page 545:

> "The modification of the rule stated in the case of *In re Fields' Estate, supra,* is tersely expressed in *Tracey v. Barton,* 139 Wash. 440, 247 Pac. 734, in the following language:
>
> " 'We have held that, when no time for the performance of a contract is fixed by the parties, if it nevertheless appears from the surrounding circumstances and, considering the object contemplated by the contract, that the parties intended that it should extend over a year, recovery could not be had upon it, unless in writing'."

As heretofore stated, paragraph 2 of Exhibit 3 shows that the parties contemplated that the agreement should continue for at least two years. Therefore the Statute of Frauds is applicable and the contract is void unless signed by the party to be charged.

Partial Performance Does Not Take the Contract Out of the Statute of Frauds

The issue of the Statute of Frauds was properly raised at the time of trial and the Court erroneously found, in Finding No. XIV, that the burden of proof upon the Statute of Frauds had not been met. The trial court undoubtedly was of the erroneous opinion that partial performance of the contract would take it out of the operation of the Statute of Frauds. The Court expressed this opinion on page 75 of the transcript as follows:

> "There are more ways than merely signing a paper to authenticate its coming into being as a thing which may represent or might be contended to represent the contract in question."

The defense of the Statute of Frauds in the State of Washington is not overcome by partial performance of a contract, in a situation, such as here, where the basis for invoking the Statute of Frauds is that the contract was not to be performed within one year.

In *Union Savings & Trust Company v. Krumm,*

88 Wash. 20, 152 Pac. 681 (1915), the Court stated, on page 33:

> "The respondent insists that there was such part performance, both of the logging contract and of the hauling contract, as to take them out of the statute of frauds. The doctrine of part performance, however, has no application to this clause of the statute of frauds. In the nature of the case, where the statute is directed solely to the character or subject-matter of the contract, part performance could not remove the ban of the statute without in effect repealing the statute. The rule is clearly stated by Pomeroy:
>
> " 'The clause relating to contracts not to be performed within a year from the making thereof, seems by its very terms, to prevent any validating effect of part performance upon all agreements embraced within it. As the prohibition related not to the subject-matter, nor to the nature of the undertaking, but to the *time of the performance itself,* it seems impossible for any part performance to alter the relations of the parties, by rendering the contract one which, by its terms, may be performed within the year. It has, indeed, been held in some cases, that if all the stipulations on the part of the plaintiff are to be performed within a year, an action will lie for a breach of the defendant's promise, although it was not to be performed within the year, and was not in writing. In all these cases, however, the promise of the defendant was simply for the payment of the money consideration, which might, in every instance, have been sued for and recovered upon his implied promise; and the doctrine itself has been expressly and emphatically repudiated by numerous other decisions.' Pomeroy, Contracts, (2d ed.), p. 141."

It should be further pointed out that the ad-

missions by the appellant to the effect that Exhibit 3 sets forth the terms of the appellee's employment, but denying that the agreement was ever signed by the person to be charged, do not take the agreement out of the Statute of Frauds. See Note in 22 A.L.R. 723, where the rule supported by voluminous authorities, is said to be:

> "The rule appears to be well settled that the mere fact that one in his pleading admits the parol contract relied upon by the other party to the suit does not prevent him from, at the same time, setting up and insisting upon the statute of frauds as a defense thereto."

As stated in *Ragghiati v. Harris,* 124 Cal. App. (2d) 17, 268 P. (2d) 45 (1954):

> "Oral repetition of that which is required to be in writing does not take the place of the writing."

CONCLUSION

Without attempting a restatement of the argument on each of appellant's Specifications of Error it is submitted that the trial court's judgment cannot be sustained under any view of the evidence, and is contrary to justice, common sense and the law of Washington in each of the respects heretofore discussed.

Briefly stated, the parties entered upon an agreement for the employment of appellee by appellant for an indefinite period in excess of one year, but this agreement was never signed. The contract was

therefore void and unenforceable. Moreover, it was terminable at the will of either party after a period of two years.

During the period of his employment, appellant, in his own words, "voluntarily reduced" his rate of commission until the operation became profitable. It was not shown that it ever became profitable. The trial court held that such a modification was not binding on the appellee, and further found that appellee merely agreed to postpone collection of a portion of his compensation. Appellee himself did not so testify, and there is no evidence that such was his intention at the time of the modification, much less that such intention was communicated to appellant.

Finally, when appellee became financially interested in another paperboard enterprise, and proposed to continue in his employment with appellant at the same time, a compromise was reached between the parties as to the termination of his compensation from appellant, by which he received commissions for a period of six months beyond the date proposed by appellant. One of the arguments advanced by appellee in his favor at that time was his prior voluntary reduction of his commission. At no time until more than one year after receiving the last payment under this final agreement, being approximately two years after the agreement it-

self, did he disclose to appellant that he made claim to further compensation in the amount by which he had "voluntarily reduced" his commissions over four and one-half years earlier.

The judgment appealed from must be reversed.

Respectfully sumitted,

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